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No._____

OCTOBER TERM, 1980

SUPREME COURT OF THE UNITED STATES

ROBERT OKIN, MICHAEL GILL AND

WILLIAM MALAMUD,

Petitioners,

v.

RUBIE ROGERS, ABLE BOLDEN, BETTY BYBEL,

JAMES COLLERAN, DONNA HUNT,

WILLIE WADSWORTH, AND HAROLD WARNER,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether involuntarily committed mental patients, who have not been adjudicated incompetent nor deemed incapable of managing their affairs, have any Constitutional right to refuse powerful mind and mood altering anti-psychotic drugs which also cause a considerable percentage of patients to suffer painful and permanent physical, intellectual, emotional and psychological adverse effects.

2. Since the Massachusetts Supreme Judicial Court, in a pending case, may obviate the need for this Court to rule on the Constitutional issues presented in the case at bar, whether, as a matter of federalism, this Court should refuse to grant certiorari.

3. Since the specific standards and procedures for the right to refuse will not be set out until the District Court issues a decision pursuant to the Court of Appeals remand order, and because few federal courts have decided the issues presented in this case, whether it is premature for this Court to grant certiorari.

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CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS

United States Constitution, First Amendment

United States Constitution, Amendment Fourteen, Section 1

Massachusetts General Laws c. 123, §25

Massachusetts Department of Mental Health Regulations, §221.02

QUESTIONS PRESENTED

1. Whether involuntarily committed mental patients, who have not been adjudicated incompetent nor deemed incable of managing their affairs, have any Constitutional right to refuse powerful mind and mood altering anti-psychotic drugs which also cause a considerable percentage of patients to suffer painful and permanent physical, intellectual, emotional and psychological adverse effects.

2. Since the Massachusetts Supreme Judicial Court, in a pending case, may obviate the need for this Court to rule on the Constitutional issues presented in the case at bar, whether, as a matter of federalism, this Court should refuse to grant certiorari.

3. Since the specific standards and procedures for the right to refuse will not be set out until the District Court issues a decision pursuant to the Court of Appeals remand order, and because few federal courts have decided the issues presented in this case, whether it is premature for this Court to grant certiorari.

STATEMENT OF THE CASE

On April 27, 1975, seven patients at the May and Austin Units of Boston State Hospital filed a civil rights class action, under 42 U.S.C. 1983, in the United States District Court of Massachusetts. The patients sought to restrain the defendant-doctors' practice of involuntarily secluding and drugging both voluntary and involuntarily committed inpatients in their units of Boston State Hospital in

non-emergencies. The plaintiffs also sought to recover compensatory damages from those responsible for that treatment. (App. at p. 45a,48a).

On April 30, 1975 a temporary restraining order (T.R.O.) was granted pending a hearing on whether a preliminary injunction should issue, scheduled for May 8, 1975. On May 8th, the attorneys for the doctors appeared before the District Court and formally assented to an extention of the T.R.O. "until a hearing on the preliminary or permanent injunction". (App. at p. 48a-49a).

A merged trial on injunctive, liability and damage issues began on December 8, 1977 and concluded on January 31, 1979, involving seventy-two days of trial, more than 8000 pages of transcripts, fifty witnesses, most of them psychologists, psychiatrists and other

professionals, and over 2,300 pages of post-trial briefs. (App. at p. 48a-50a) On October 29, 1979, the District Court issued an order and decision granting the patients' requested injunctive relief on both their medication and seclusion claims while denying the patients' damage claims. The District Court's permanent order stated, in relevant part "that the defendants, their agents and employees, are restrained from forcibly medicating the plaintiffs and all other patients of the Austin and May units, and successor units, of the Boston State Hospital without the patient's consent or the consent of the patient's guardian, if any, except where there is a substantial likelihood of, or a result of, extreme violence, personal injury or attempted suicide." (App. at p. 162a-163a).

Prior to the issuance of the April

30, 1975 temporary restraining order, the practice of the hospital units in question was to forcibly medicate both voluntary and involuntarily committed patients who refused to take prescribed anti-psychotic drugs in non-emergencies. (App. at p. 45a) If necessary the patient would be physically restrained, have his/her pants removed, and be injected with an anti-psychotic drug with a hypodermic needle in the buttocks, at times in full view of other patients, or staff of the opposite sex. (App. at p. 96a-98a)(Finding No. 248).

The defendants-doctors did not appeal the seclusion injunctive portion of the District Court order. (App. at p. 33a) They did appeal the medication injunctive portion of the District Court's decision to the United States Court of Appeals for the First Circuit. On November 25, 1980 the Court of

Appeals issued a unanimous decision, substantially affirming the District Court's injunctive order but modifying certain aspects of the District Court's decision. (App. at p. 3a)

The defendant-doctors only seek certiorari from the Court of Appeals' decision as it applies to involuntarily committed patients. They do not appeal the order and judgment as it concerns voluntarily admitted patients.

1. BOTH THE DISTRICT COURT AND THE COURT OF APPEALS FOUND THAT THERE IS A CONSTITUTIONAL BASIS FOR THE RIGHT TO REFUSE.

Both the District Court and the Court of Appeals agreed that a patient has a substantial interest in refusing anti-psychotic drug treatment. The District Court relied on both the Constitutional right to privacy and the First Amendment for its ruling. (App. at p. 87a-92a).

The District Court's holding that the First Amendment was violated was based on its findings that anti-psychotic drugs not only have "the potential to affect and change a patient's moods, attitude and capacity to think" but that these drugs are "powerful enough to immobilize both body and mind..." (App. at p. 69a,87a,90a,98a)

The Court of Appeals substantially adopted the District Court's reasoning by declaring that it is an "[i]ntuitively obvious proposition" that a person has a "constitutionally protected interest in being left free by the state to decide for himself whether to submit to this serious and potentially harmful medical treatment that is represented by the administration of anti-psychotic drugs." (App. at p. 4a) The Court based its ruling on the penumbra of the due process clause of the Fourteenth

Amendment, which protects each citizen's right to privacy, bodily integrity, and personal security. (App. at p. 5a) The Court of Appeals adopted the District Court's findings as to the potentially harmful effects of anti-psychotic drugs, including their ability to "immobilize both the body and mind" but felt it unnecessary to rely on the First Amendment for its decision. (App. at p. 4a,5a,17a,27a)

2. STATE INTERESTS IN FORCED MEDICATION

a. The Power to Forcibly Medicate Under the Police Power

The District Court held that a doctor, in his or her professional judgment, had the authority to forcibly medicate a patient in an "emergency situation in which a failure to do so would result in a substantial likelihood of physical harm to the patient, other

patients, or to staff members of the institution." (App. at p. 85a)

The District Court found that the doctors' claims of increased violence under its emergency standard, since the T.R.O. was issued, were "more dramatic than factual." (App. at p. 99a). The Court of Appeals agreed that the relationship of increased violence to the Court's 1975 order was substantially exaggerated by the doctors. (App. at p. 9a) Yet it asserted that because of the unpredictability of some patients' potential for violence, and the substantial state interest in protecting all patients from harm in an institution, the "clear cut unitary standard of quantitative likelihood that violence would occur if no medication is administered" was inappropriate, because it lacked sufficient flexibility. (App. at p. 9a-15a) In recognition of both

the strong state and patient interest involved in the decision of whether or not to use forced medication to prevent violence, the Court of Appeals held that a doctor may only administer anti-psychotic drugs under the police power as a

> result of a determination that the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated individual....Additionally reasonable alternatives to the administration of anti-psychotic drugs must be ruled out... (App. at p. 14a)

b. The Power to Forcibly Medicate Under the Parens Patriae Power

The defendants asserted that court commitment under Massachusetts law constituted the determination of incapacity necessary for the state to provide treatment over the objections of patients. (App. at p. 18a) The District Court and Court of Appeals rejected this argument, finding that

Massachusetts statutory law and judicial precedent clearly contradicted the defendants' assertions. The District Court and Court of Appeals held that to treat under the parens patriae power, an involuntary patient had to be specifically adjudicated incompetent by a court. (App. at p. 16a-26a,73a-75a)

The Court of Appeals did express concern that there may be circumstances in which the doctors can not obtain an adjudication of incompetency fast enough so that during the period of delay in judicial action the failure to medicate would cause the patient to significantly deteriorate. In those limited situations the Court authorized forced medication to the extent and type necessary to prevent significant deterioration during the delay. The Court also ordered that a procedure be created that allowed for a temporary

decision whether a patient is incompetent until the state court rules on the issue. (App. at p. 24a-26a)

c. The Court of Appeals Order

The Court of Appeals remanded the case to the District Court to develop workable, Constitutionally valid procedural safeguards for patients' rights as well as to provide more specificity to the standards for forced medication set out by the Court of Appeals. (App. at p. 38a).

On December 18, 1980 the District Court set an expedited schedule to comply with the Court of Appeals' remand order. At the hearing the defendant-doctors argued that the District Court order was totally vacated, which would leave patients without any protection pending a new decision by the District Court. (App. at p. 167a-180a). The District

Court read the Court of Appeals' decision to mean that as long as the term 'substantial likelihood' in its order was not used to mean a probability, the language "substantial likelihood" was not inconsistent with the Court of Appeals decision. (App. at p. 178a) The doctors filed a Motion to Clarify its order in the Court of Appeals in order to have the District Court's interim order vacated. The Court of Appeals refused to grant the motion citing to the District Court's expedited schedule for briefs and proposals. (App. at p. 164a-165a)

ARGUMENT

I. EVEN THOUGH AN INVOLUNTARILY COMMITTED MENTAL PATIENT'S CONSTITUTIONAL RIGHT TO REFUSE TREATMENT RAISES IMPORTANT QUESTIONS, IT IS PREMATURE FOR THIS COURT TO DECIDE THE ISSUES PRESENTED IN THE CASE AT THIS TIME.

The patients agree that because

this case raises important issues,at some point this Court should grant certiorari. However, the patients maintain that there are three significant reasons why it is premature for this Court to grant certiorari at this time.

The Court of Appeals remanded to the District Court a number of substantial issues which need to be resolved before this court can be fully and adequately presented all the issues presented by this case. This Court should wait until this case's posture is more amenable to review.

The Massachusetts Supreme Judicial Court has pending a case titled In Re Guardianship of Richard Roe, No. 2257 (Argued October 8, 1980) which may obviate the need for this court to reach the Constitutional questions presented in the case at bar. As a matter of federalism this Court should deny the doctors'

petition for certiorari.

The federal courts have not had an adequate opportunity to evaluate and to analyze the issues and facts presented in 'right to refuse treatment' cases. This Court should await further development of the difficult and complex issues presented by this case by the federal courts.

A. This Court Should Await the Results of the Remand Order to the District Court and its Review by the First Circuit Court of Appeals Before Granting Certiorari.

The Court of Appeals order set out only the general standards and parameters for involuntary patients' right to refuse anti-psychotic drugs but failed to address a number of important issues.

1. The Court of Appeals Remanded To The District Court To Determine What Less Restrictive Means Are Normally Available To The Hospital To Prevent Violence To Avoid The Necessity of Forcibly Administering Antipsychotic Drugs.

Based on the Court of Appeals' decision, the District Court, relying on the evidence presented below was ordered to: 1) Prepare a list of alternatives to the forced administration of anti-psychotic drugs which are reasonably available to prevent violence and are generally available to do this; and 2) Develop a feasible procedure for insuring that such alternatives are adequately considered and rejected before forced medication is resorted to; and 3) Decide what kinds of documentation must be kept to insure that the proper considerations are made and can be effectively reviewed by impartial doctors, guardians or courts later. (App. at p. 14a-15a).

2. The Court of Appeals Remanded the Issue of What Procedures Would Insure That The Doctors Adequately Take Into Consideration The Interests of the Patients When Determining if the Need to Prevent Violence in a Particular Situation Outweighs the Possibility of Harm to the Medicated Individual From Taking the Drug.

The District Court, based on the evidence submitted, was ordered to: 1) Determine what specific factors must be considered in the balancing test under the police power; 2) Decide what kinds of documentation must be kept to insure that the proper considerations are made, and can be effectively reviewed by impartial doctors, guardians, or courts later; 3) Determine what kind of in-house periodic review must be made to insure patients' interests are protected and to prevent abuse or neglect by front line personnel; and 4) Decide what independent review procedures are to be followed consistent with due process to review the qualified physician's decisions to medicate the patient under the police power because of the risk of violence. (App. at p. 14a-15a)

3. The Court of Appeals Remanded the Issues Relating to What Procedures May be Used for Making Quick, Temporary Incompetency Determinations Where There is an Immediate Risk of Significant Deterioration to the Patient During the Delay Between the Time the Doctor Decides That the Patient is Incompetent and Seeks an Adjudication of Incompetence and When He is Able to Get a Judicial Ruling on the Issue of the Patient's Competency.

The District Court was also ordered by the Court of Appeals to: 1) Design a practical procedure fast enough to deal with the occasional situation where any delay in medicating would cause significant deterioration in the patient, but fair enough to insure a truly impartial determination of incompetency by an individual(s) with the knowledge of the legal standards of incompetency; 2) Develop a documentation requirement to insure that proper factual and legal factors are considered in determining incompetency; 3) Develop a review

procedure both to evaluate the temporary ruling and to insure that only the amount and type of medication necessary to prevent significant deterioration is involuntarily given pending the state court's decision on incompetency. (App. at p. 26a-30a).

4. The Court of Appeals Remanded The Issues Relating to What Procedural Safeguards May Insure The Rights of a Patient Adjudicated Incompetent to be Involuntarily Medicated With Anti-psychotic Drugs Only in the Circumstances Allowed by Law.

The District Court was ordered to: 1) Determine who should apply the substituted judgment test once a patient is declared incompetent by a court; 2) Design procedures for the review by non-treating independent physicians of the full treatment history of the patients declared incompetent to insure that the decision-maker is in fact attempting to make treatment decisions as the patients

themselves would were they competent; and 3) Develop documentation requirements to insure that the proper factual and legal considerations are given to the issue of "substituted judgment". (App. at p. 27a-30a).

B. The Massachusetts Supreme Judicial Court Has A Pending Case Which May Obviate The Need For This Court To Reach Many Of The Constitutional Questions And Issues Presented In This Case.

The Massachusetts Supreme Judicial Court has pending before it a case which may obviate the need for this court to reach the Constitutional questions presented in the case at bar. This case is titled In Re Guardianship of Richard Roe No. 2257, and was argued before the Court on October 8, 1980.[1]

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[1] The plaintiffs and defendants in the case at bar intervened as parties in the Roe case and presented oral arguments to the Supreme Judicial Court.

In that case the Massachusetts Supreme Judicial Court was presented with a number of similar issues to the issues presented in the case at bar including whether under state law the trial court was correct in requiring an incompetency hearing before Richard Roe could be considered incompetent to make treatment decisions, and whether the trial court was correct in appointing a guardian when it found Richard Roe to be unable to properly manage his affairs. The Court also was asked to determine whether a competent person has the right to refuse drugs, whether a person declared incompetent by a court has the right to refuse anti-psychotic drugs and whether the trial court was required to adopt a substituted judgment test rather than a best interest test to determine if it was to approve the administration of anti-psychotic drugs to Richard Roe.

The fact that the issues raised in this petition for certiorari may be resolved under Massachusetts state law, considered in conjunction with the fact that the Court of Appeals remanded this case to the District Court to resolve a number of the complex issues in this case, militates against this Court granting certiorari. However, even if the Supreme Court is disposed to grant certiorari, this Court, based on federalism principles, should await the Massachusetts Supreme Judicial Court's decision before determining whether to grant certiorari.

C. The Federal Courts Have Not Had An Adequate Opportunity To Evaluate And To Analyze The Issues And Facts Presented In Right To Refuse Treatment Cases.

As of this date few federal courts have directly and thoroughly addressed the central issues presented in the case at bar. Of those cases only one has

been thoroughly reviewed by a Circuit Court of Appeals; the First Circuit in the case at bar. It should be noted that the Second Circuit in 1971 ruled in a case involving a Christian Scientist's claim that she had a right to refuse treatment based solely on religious grounds. The Court of Appeals found such a right. The Supreme Court refused to grant certiorari in that case. Winters v. Millers, 446 F. 2d 65 (2nd Cir. 1971), cert. denied 404 U.S. 985 (1971). Only two other District Courts have been presented with the same issues as the case at bar and ruled after trials on the merits. Both cases found that there was a Constitutional right to refuse treatment. Rennie v. Klein, 462 F. Supp. 1131 (D.N. J. 1978) and 476 F. Supp. 1294 (D.N.J. 1979); Davis v. Hubbard, 49 U.S.L.W. 2215 (D.C.N. Ohio, September 30, 1980).

Before this Court reviews and rules upon the complex and difficult issues presented in the case at bar it should await further evaluation and analysis by the federal courts of the claims and issues raised by this case.

II. THERE IS NO CONFLICT BETWEEN FEDERAL COURTS, OR BETWEEN THE FIRST CIRCUIT AND ANY STATE COURT.

The defendants cite to two Minnesota Supreme Court cases as a ground for issuing certiorari, arguing that as a result of those decisions there is a direct conflict between a state court and a federal court. In the cases cited to, Price v. Shephard, 307 Minn. 250, 239 N.W. 2d 905, 911 (1976) and its progeny, In the Matter of the Alleged Illness of Paul Fussa (Docket No. 469 Minn. Sup. Ct. June 14, 1976) the Minnesota Supreme Court ruled that in order to involuntarily administer

intrusive forms of treatment such as psychosurgery and electroshock on committed patients Minnesota law would require an adversary court proceeding to determine if treatment is to be authorized. The Minnesota court stated that in making individual determinations the court should balance the patient's need for treatment against the intrusiveness and potential risk of the prescribed treatment.

The Minnesota Supreme Court, as did the lower District Court and Court of Appeals in the case at bar, recognized that patients have a fundamental Constitutional right to privacy that can only be overcome by legitimate, important state interests and when overridden must be done in the least intrusive manner.

However, the Minnesota Supreme Court held that the involuntary administration of anti-psychotic drugs may not be

refused by a patient and need not be authorized by a court. The Court primarily based this holding on its interpretation of Minnesota law; that all committed patients have been adjudicated incompetent and are unable to rationally make treatment decisions. This holding is totally inconsistent with Massachusetts statutory and case law and the findings of the District Court regarding patients' competency. (App. at p. 73a-75a). That court, contrary to the case at bar, and all other cases reviewing the effects of anti-psychotics ruled that the drugs were not intrusive. At best this constitues a conflict of fact finding, not law. See In re Cleo Lundquist, No. 140151 (Ramsay Cty. Minn. Prob. Ct., April 30, 1976), cited in In Matter of B., 156 N.J. Super. 231, 383 A. 2d 760, 762(N.J.1977).

III. THE COURT OF APPEALS AND DISTRICT COURT HOLDINGS WERE CORRECT.

A. The Doctors' Argument That Patients Do Not Have a Constitutional Right To Refuse Treatment Is Without Merit.

The doctors argue that there is no Constitutional and common law basis for the right to refuse treatment for involuntarily committed patients. In effect, the doctors seek this Court to declare that traditional common law and Constitutional principles are inapplicable to hospitalized patients who are not adjudicated incompetent. This position ignores the long standing common law and Constitutional underpinnings of our Constitutional system.

The fundamental right to the inviolability of every individual's mental and bodily processes forms not only the nucleus of the First Amendment, but has also seen development through the right to privacy doctrine which finds its basis from both Constitutional and common law principles.

It is a well-established and fundamental principle of law in this country that individuals have the right to choose between accepting or rejecting medical treatment recommended to them by a physician. Moos v. U.S., 225 F. 2d 705, 706 (8th Cir. 1975); "Developments-Civil Commitment", 87 Harv. L. Rev.1190, p. 1194-1196 n. 10, 12; Canterbury v. Spence, 464 F. 2d 772, 780 (D.C. Cir. 1972) cert. denied 409 U.S. 1064, 93 S. Ct. 560, 34 L. Ed.2d 518 (1972). See Dunham v. Wright, 423 F. 2d 940, 943-944 n.6 (3rd Cir. 1970).

In addition to the District Court and Court of Appeals in the case at bar a number of federal and state courts have found that the Constitutional right to privacy and freedom of expression must include protection of mental patients' personal autonomy and their right to self-determination. The right to privacy would be eviscerated if it

did not preclude interference with patients' right of self-determination, absent an emergency. Davis v. Hubbard, supra; Winters v. Miller, supra; Rennie v. Klein, supra; Scott v. Plante, 532 F. 2d 939, 946 (3rd Cir. 1973); Bell v. Wayne County General Hospital at Eloise, 384 F. Supp. 1085, 1100 (E.D. Mich. 1974); In re K.K.B., supra; In re Boyd, 403 A. 2d 744, 750 (D.C. Ct. App. 1979); Kaimowitz v. Michigan Department of Mental Health, No. 73, 19434 AW, 42 U.S.L.W. 2063, 2 Prison Law Reptr. 433 (Mich. Cir. Ct. Wayne City, Mich. July 10, 1973), Goedecke v. State of Colorado Department of Institutions, 603 P. 2d 123 (Colo. Sup. Ct. 1979); New York Health and Hospital Corp. v. Stein, 335 N.Y.S. 2d 461, 70 Misc. 2d 944 (Sup. Ct. N.Y. 1973).

Massachusetts has also recognized the

doctrine of informed consent in order to insure the protection of incompetent as well as competent person's bodily processes. Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E. 2d 417, 424 (1977).

The District Court also held:

> The concept of a right of privacy also embodies First Amendment concerns. It is clear from the evidence in this case that psychotropic medication has the potential to affect and change a patient's mood, attitude and capacity to think.... Whatever powers the Constitution has granted our government, involuntary mind control is not one of them, absent extraordinary circumstances. The fact that mind control takes place in a mental institution in the form of medically sound treatment of mental disease is not, itself, an extraordinary circumstances warranting an unsanctioned intrusion on the integrity of a human being. (App. at p. 90a-91a)

Privacy of thought is a precondition and necessary condition of free speech and communication and thus inseparable from it. The privacy of mental acts is

thought to have intrinsic value in our society and is considered to be a foundation of our democratic institutions. See Scott v. Plante, supra at p. 946; Souder v. McGuire, 423 F. Supp. 830, 832 (M.D. Pa. 1976); Mackey v. Procunier 477 F. 2d 877, 878 (9th Cir. 1973); Rennie v. Klein, supra 462 F. Supp. at 1144; White v. Davis 13 Ca. 3rd 757, 774, 533 P. 2d 222, 233, 120 Cal. Rptr. 94, 105 (1975); Kaimowitz v. Michigan Department of Public Health, supra.

B. The Doctors Argument That Involuntarily Committed Patients Do Not Have A Constitutional Right To Be Treated In The Least Restrictive Manner Is Unsupportable.

The due process clause principle of the least restrictive alternative has become widely accepted by courts as part of a state's Constitutional duty when regulating certain conduct which involves fundamental rights

or Constitutionally protected activity.[2] Numerous courts have upheld the principle to be applicable to hospitalized mental patients who are civilly committed, in recognition that civil commitment entails a substantial infringement of personal liberty.[3]

C. The Doctors Argument That It Should Not Be Necessary To Require A Patient To Be Judicially Declared Incompetent Before They May Be Permitted To Forcibly Medicate Involuntarily Committed Patients Since Their Commitment Constitutes A Finding Of Incompetence, Is Inconsistent With Massachusetts Law.

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2 See Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974) (right to travel); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S. Ct. 791, 39 L. Ed. 2d 52 (1974) (the right to procreate); Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960) (freedom of association); Nolan v. Fitzpatrick, 451 F. 2d 545, 548 (1st Cir. 1971) (prisoners' speech).

3 See for example Covington v. Harris, 419 F. 2d 617 (D.C. Cir. 1969); Welsch v. Likins, 373 F. Supp. 487, 502 (D. Minn. 1974); Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974). See also Price v. Shephard, supra.

Massachusetts law is clear that commitment to a hospital or a finding of mental illness is not an adjudication or finding that a patient is incompetent, or that a patient is unable to manage his own affairs. Fazio v. Fazio, 378 N.E. 2d 951 (1978); Boyd v. Board of Registrars of Belchertown, 368 Mass. 681, 334 N.E. 2d 629 (1975); Leggate v. Clark, 111 Mass. 308 (1873); M.G.L. c. 123, §25; D.M.H. Reg. 221.02 (App. at p. 66 a). The District Court and Court of Appeals were correct in their interpretation of Massachusetts law. (App. at p. 21a-23a, 73a-75a, 78a). Other jurisdictions share this position. In re Boyd, supra 403 A. 2d at 747, n.5; Vecchione v. Wohlgemuth, 377 F. Supp. 1361, (E.D. Pa. 1974); Rennie v. Klein, supra; Winters v. Miller, supra, McAuliffe v. Carlson, 377 F. Supp. 896 (D. Conn. 1974).

Furthermore the District Court found that many patients, though committed, were competent to make their own treatment decisions and evaluate the risks, benefits and discomforts from receiving antipsychotic medication. (App. at p. 74a).

In addition, the doctors ignore the fact that under Massachusetts law an incompetent person's articulated preferences concerning treatment is to be generally respected as long as the incompetent person is "able to express a 'sensible opinion' as to his desire." In the Matter of Spring, 1980 Mass. Adv. Sh. 1209, at 1221 (Mass. May 1980); Doe v. Doe, 1979 Mass. Adv. Sh. 343, 385 N.E. 2d 995 (1979); Superintendent of Belchertown v. Saikewicz, supra.

IV. GENERAL IMPORTANCE OF THE CASE

A. The Issues Presented In The Case

As stated previously the patient-respondents agree that the primary issue

presented by the case at bar is an important one which should be reviewed by this Court when it is presented in a more appropriate posture.

The patients believe the primary issue presented by the case at bar is whether involuntarily committed mental patients, who have not been adjudicated incompetent or deemed unable to manage their affairs, have any Constitutional right to refuse powerful mind and mood altering anti-psychotic drugs which causes a considerable percentage of patients to suffer painful and permanent physical, intellectual, emotional and psychological adverse effects.

The patients strongly disagree with the petitioner-doctors articulation of the issues raised by this case.

(1) The petitioner-doctors argue that one issue in this case is the ability of state hospitals to administer

essential treatment to its involuntarily committed mental patients. The state doctors seek a power which other doctors in other medical settings would never seek. In addition

> As has been pointed out, the target of plaintiffs' suit is forced injection of psychotropic medication. Given a patient's refusal, other traditional means of psychotherapy and treatment would continue to be available. The fact that some doctors may feel that the use of psychotropic drugs is quicker and more effective than other available treatment does not mean that patients should not be given the option to follow a more conservative course in a non-emergency setting. (App. at p. 99a-100a)(See also App. at p. 86a)

Furthermore, few patients refused their medication for prolonged periods. (App. at p. 98a-100a)

As shown by these findings when patients were provided the right to refuse and doctors were required to respond to patients' complaints and seek the cooperation of patients, most patients

agreed to submit to some form of medication. (See also Finding #223-225)

(2) The doctors also argue that an issue presented in this case is whether the state has a Constitutional obligation and duty to treat all involuntarily committed patients, whether committed under the state's police power or its parens patriae power. That argument presumes that patients have a Constitutional right to treatment which they cannot waive. In order for this Court to adopt the doctors' argument that they are legally obligated to provide forced treatment to involuntarily committed patients, it must find that there is a Constitutional right to treatment, and, unlike other Constitutional rights, patients may not waive that right.

The District Court addressed this issue when it held:

> The state has a duty to make treatment available. It has no duty to impose treatment on a competent involuntary patient who prefers to refuse medication, regardless of its potential benefit. (emphasis in original)(Appendix at p. 101a).

The doctors' position is that there are no Constitutional limitations on a doctors' ability to forcibly treat an involuntary patient, no matter how intrusive, or dangerous, as long as the state hospital patient could not prove the practice constituted malpractice. The logical extension of the doctors' argument is that the unrestricted use of involuntary psychosurgery and electroshock would be constitutionally permissible.

(3) The doctors claim that an issue in this case is the doctors' obligation to prevent the needless suffering of patients who refuse their drugs. However, the doctors fail to mention the serious, painful and permanent adverse

effects caused by ingesting antipsychotic drugs.

In addition to the adverse effects on intellectual processes, described before, the District Court found and the Court of Appeals affirmed that

> Foremost among the possible side effects of antipsychotic drugs is tardive dyskinesia. Tardive dyskinesia is a neurological side effect which may appear after prolonged use of antipsychotic drug treatment. The disease is an outcome of a complex patient-drug interaction which is not currently well understood. The overt symptoms of tardive dyskinesia include certain involuntary motor movements, particularly of the face, lips, and tongue. Tardive dyskinesia can also cause the involuntary movement of fingers, hands, legs and the pelvic area. In its most progressive state, the disease can interfere with swallowing and can affect all motor activity. While in mild cases the disease can simply be a source of embarrassment, it can be physically and psychologically disabling. Until very recently, tardive dyskinesia was considered irreversible. Some studies now suggest that in certain cases it can be effectively treated.
>
> Recent studies also suggest that tardive dyskinesia is more

> widespread in mental patients than previously considered. Two studies now place the prevalance of tardive dyskinesia among chronically hospitalized schizophrenics at 50% and 56%. With respect to outpatients, one survey has reported a prevalence rate of 41%. (App. at p. 69a-70a, 4a-5a, 27a)(The District Court's footnotes were ommitted.)

The District Court's findings as to these dangerous and painful adverse side effects has been found by most courts who have reviewed the effects of antipsychotic drugs. (App. at p. 69a-70a); See for example, Rennie v. Klein, supra; Davis v. Hubbard, supra; Goedecke v. State of Colorado Department of Institutions, 603 P. 2d 123 (Colo. Sup. Ct. 1979); In re K.K.B., 609 P. 2d 747 (Okla. Sup. Ct. 1980).[4]

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4 The Supreme Court of Colorado found that prolixin, an antipsychotic drug, "aside from its physical side effects" and "behavior modifying capacity causes severe depression (often accompanied by suicidal feelings) in 25-30 percent of the persons treated with it, and causes severe side effects in half of the [Con't on next page]

(4) The doctors also argue that at issue in this case is whether hospital facilities will be treating facilities or caretaking facilities. The defendant-doctors ignore the findings by the District Court and the weight of the evidence:

> Also to be borne in mind is that the great majority of patients have not declined their psychotropic medication during the pendency of the T.R.O. Most of those who did changed their minds within a few days. This speaks well for the confidence in a doctor's judgment that may be established given the effort to establish a strong therapeutic alliance. (App. at p. 92a,100a).

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patients treated with it." See also In re Cleo Lundquist, No. 140154 (April 30, 1976), cited in Matter of B., 156 N.J. Super. 231, 383 A. 2d 760, 763 (Sup. Ct., N.J. 1977). The Court found that one injection of Prolixin Decanoate "may produce changes in the patient's mental processes lasting from four to eight weeks and [t]hat once injected into the body there is no known drug that can be used to counteract the effects of Prolixin Decanoate." and In re Boyd, 403 A. 2d 744, 752 (D.C. Ct. App. 1979); one of the unpleasant side effects of antipsychotic drugs is "slowing of the thought processes."

Indeed a fundamental concept of treating the mentally ill is the establishment of a therapeutic alliance between psychiatrist and patient. Implicit in such an alliance is an understanding and acceptance by the patient of a prescribed treatment program. (App. at p. 92a, 100a). See also Rennie v. Klein, supra 462 F. Supp. at 1161 (D.N.J. 1978).

(5) The doctors argue that an issue in this case is whether the standards applied by the Court of Appeals force doctors to treat patients in a contrary fashion to what they believe is proper practice. Again this position ignores the weight of the evidence and the District Court findings.

> In analyzing defendants' prediction of doom should the TRO be made permanent, it is helpful to recall the testimony of the defendants and most of their expert witnesses, to the effect that they would respect a patient's preference to refuse

> treatment absent an emergency situation. In other words, although not conceding a patient's legal right to refuse treatment, the professionals' practice is to honor the refusal, except in an emergency. That testimony is inconsistent with any prediction of a chaotic institutional atmosphere if patients' wishes to refuse medication are honored. Certainly the expressed attitude of these interested professionals demonstrates that respecting and abiding by a competent mental patient's wishes concerning medication would not undermine the ethical integrity of the medical profession. (Emphasis added) (App. at p. 102a) (See also findings #262, 253-261, 263, 264)

(6) The doctors argue that at issue in the case is the ability of the state to continue reducing state hospital populations.

However, as Dr. George Crane, one of the foremost psychopharmacologists has stated, even though there has been rapid deinstitutionalization since the introduction of antipsychotic drugs, probably the most important explanation for the erosion of the hospital system is the

administrations' failure to solve a number of chronic problems, such as inadequate staffing, low morale of personnel, and substandard psychiatric care of the mentally ill. Crane "Two Decades of Psychophamacology and Community Mental Health," Trans. of N.Y. Acad. of Sci., Series II., Vol. 36 (1974).

(7) The doctors argue that the procedures established for them to make forced drugging decisions are at issue in this case. However, the procedures to be utilized by doctors have not yet been established. This is one of the issues the Court of Appeals remanded to the District Court. Unless the Court determines there are no limitations to the doctors' forced drugging practices this Court would need to await the creation of the procedural mechanisms by the District Court pursuant to the Court of Appeals' remand order, to determine if such procedures are Constitutionally acceptable.

(8) The doctors also argue that the state's ability to protect patients and staff from preventable violence is severely curtailed by the District Court order. The defendants do not argue that the Court of Appeals' order is overly burdensome but argue that the District Court's order is oppressive. The District Court's standard is not before this Court. This standard was modified by the Court of Appeals and does not remain in effect. A less detailed District Court interim order remains in effect, which is consistent with the Court of Appeals' order, for the brief period the District Court needs to prepare a more detailed order.

(9) The defendants argue that the First Circuit's definition of an emergency justifying forcible medication is too narrow. The patients maintain that the Circuit Court's opinion adequately balances the substantial interest of the

patients and the doctors at state hospitals. The Court of Appeals' order expressly gives the doctors the right to make individual decisions about a patient's potential for violence. The doctors seek to make decisions not based on an individualized assessment. Under the Court of Appeals standard, as long as a doctor finds the risk of violence outweighs the risk to a patient from taking the drugs and that there is no less restrictive treatment, the doctor is free to use the anti-psychotic drug. (App. at p. 11a-12a). It should be noted that during the period the original District Court order was in effect from April, 1975 through October 1979 the District Court found that:

> Should the TRO be made permanent, defendants foresee institutional settings becoming mere warehouses, characterized by increases in violence, patient apathy, length of

> stays and administrative problems. The evidence in this case, however, demonstrates that such a gloomy forecast is more dramatic than factual. (App. at p. 99a).

The Court of Appeals also found that the state's claim of violence attributed to the District Court's T.R.O. was exaggerated. (App. at p. 9a).

(10) The doctors argue that their forced medication practices did not demonstrate patient abuse, and therefore, judicial intervention is unnecessary.

The primary issue is not the abuse of these drugs but that anti-psychotic drugs are administered without the consent of patients. The patients sought judicial intervention to prevent the involuntary administration of anti-psychotic medication. For injunctive purposes it was not necessary for the patients to prove that the doctors intended to harm them. The doctors' general practice of violating their Constitutional rights

was sufficient.

V. THE PRINCIPLES OF FEDERALISM ARE NOT VIOLATED BY THE COURT OF APPEALS' REMAND ORDER TO THE DISTRICT COURT.

The doctors argue that the First Circuit's remand order to the District Court to address certain procedural questions regarding the implementation of the "right to refuse" violates principles of federalism. However, the doctors do not challenge the court's equitable jurisdiction to grant such relief, but argue instead that federal courts should leave state officials alone to fashion their own administrative responses to this order.

As the doctors point out, citing Rizzo v. Goode, 423 U.S. 362, 378, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976), "the nature of the violation

determines the scope of the remedy." In Rizzo, this Court found that the police administrators had no policy of violating the Constitutional rights of the plaintiffs. Unlike Rizzo, this case involves defective procedures which need to be changed to insure that the patients' substantive rights are not violated. In examining virtually every aspect of the actual drug practices used by these units, the District Court found that the supervising doctors' drug policies and practices violated the patients' Constitutional rights, and an injunction was issued.

The doctors also argue that any court-imposed procedures will offend "The special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own laws."

Yet the Court of Appeals explicitly stated it was unable to find the doctors'

forced medication procedures Constitutionally sufficient (App. at p. 29a). In addition, by arguing that all persons labeled by doctors as "psychotic" are incompetent to make treatment decisions, the state attorney general is implicitly asking this Court to declare a state statute, M.G.L. c. 123, §25, unconstitutional as an impermissable interference with the doctors' right to practice medicine.

The doctors' position that no procedures are Constitutionally required is also contradicted by the one case they rely on, Parham v. J.R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979). This Court recognized that a number of procedural safeguards were necessary to protect a minors' right to be free from inappropriate civil commitment. The informality of the procedures was

largely based on the special nature of the parent-child relationship.

The doctors in the case at bar, on the other hand, want to be able to assume the role of parent or guardian for the purpose of making all anti-psychotic drug decisions for involuntarily committed patients. In no other context, including prisons, do medical doctors have such power. The analogy to Parham would be to have only doctors, personally unfamiliar with a minor, making treatment decisions, regardless of the parents' or guardians' feelings. This Court in Parham did not find that arrangement Constitutionally sufficient. Id.

The District Court should be given the opportunity to develop efficient and workable procedures. It may be incumbent upon the District Court to support its procedural orders by evidence in the record which indicates a need for a given

procedure, but this Court should allow the District Court to proceed to develop procedures which are Constitutionally justified by the evidence.

CONCLUSION

For the reasons stated, the defendant-doctors petition for a writ of certiorari to review the judgment and opinion of the First Circuit should be denied.

Respectfully submitted,

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